

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIAN O'TOOLE,)	
Plaintiff)	C.A. No. 07 - 590
)	District Judge Nora Barry Fischer
v.)	Magistrate Judge Lisa P. Lenihan
)	
JEFFREY BEARD, DEPARTMENT)	
OF CORRECTIONS; SUP. HARRY)	
WILSON, SCI-FAYETTE; PRISON)	
HEALTH SERVICES, INC.; AND)	
CHRIS MEYER,)	
Defendants.)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that Plaintiff's Motion to Remand to Commonwealth Court (doc. no. 5) should be granted as removal to this United States District Court for the Western District of Pennsylvania was not joined in or consented to by all Defendants, violating the unanimity requirement of 28 U.S.C. § 1441.

II. REPORT

The Plaintiff, Brian O'Toole, is a state prisoner confined at the State Correctional Institution at Fayette ("SCI-Fayette"). On April 19, 2007, the Plaintiff filed a Petition for Review in the Commonwealth Court of Pennsylvania alleging improper medical care resulting in a violation of his civil rights under both state and federal law. The named Defendants in Plaintiff's Petition for Review were the Pennsylvania Department of Corrections ("the D.O.C."), SCI Fayette, and Prison Health Services Incorporated.

On May 2, 2007, Chris Meyer and Prison Health Services filed a Notice of Removal to this United States District Court of Western Pennsylvania. Plaintiff filed a Motion to Remand on May 18, 2007, alleging that removal was improper because when "there are multiple defendants, all defendants, except nominal ones, who have been served must join in or formally consent to notice of removal within thirty days of the date that any one of the defendants was first served." (Motion for Remand, ¶1.) Plaintiff argues that the D.O.C. and SCI Fayette did not join in removal within thirty days, rendering removal invalid.

On June 14, 2007, Prison Health Services Inc. and Chris Meyer filed a Response to the Plaintiff's Motion to Remand alleging that service of process had not been made upon Jeffrey Beard and Superintendent Harry Wilson, and, consequently, Jeffrey Beard and Superintendent Harry Wilson did not have to consent to the removal. Plaintiff responded to the Defendant's Response by providing copies of certified mail to Prison Health Services Inc., SCI Fayette, the D.O.C., the Attorney General, and the Prothonotary in Harrisburg, Pennsylvania (doc. no. 7).

In determining whether removal is proper, the Court of Appeals for the Third Circuit states "the removal statutes are to be strictly construed against removal and [that] all doubts should be resolved in favor of remand." Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010 (3d Cir. 1987). In order for removal to be proper, unanimity among the defendants is generally required. Balazik v. County of Dauphin, 44 F.3d 209, 213

(3d Cir. 1995). An exception to this general rule applies when the non-joining defendants have not been served with service of process at the time the removal petition is filed. Pullman Co. v. Jenkins, 205 U.S. 534, 540-41, 59 S.Ct. 347, 350 (1939).

Rule 1514 of the Pennsylvania Rules of Appellate Procedure requires as follows.

(a) Filing with the prothonotary. The petition for review, with proof of service required by Subdivision (c) of this rule, shall be filed with the prothonotary of the appellate court in person or by first class or certified mail.

If the petition for review is filed by first class or certified mail, the petition shall be deemed received by the prothonotary for the purposes of Rule 121(a) (filing) on the date deposited in the United States mail, as stamped by post office personnel on a U.S. Postal Service Form 3817, certificate of mailing, or U.S. Postal Service Form 3800. The certificate of mailing shall show the docket number of the matter in the government unit, and shall be either enclosed with the petition or separately mailed to the prothonotary.

. . .

(c) Service. A copy of the petition for review shall be served by the petitioner in person or by certified mail on the government unit that made the determination sought to be reviewed. In matters involving the Commonwealth, the petitioner shall similarly serve a copy upon the Attorney General of Pennsylvania. Where there is more than one respondent, the petitioner shall separately serve each one. All other parties before the government unit that made the determination sought to be reviewed shall be served as prescribed by Rule 121(b) (service of all papers required).

Pa. R. App. P. 1514.

Plaintiff provided proof of service of process via

certified mail to all Defendants, as required by Rule 1514 of the Pennsylvania Rules of Appellate Procedure, mailed on April 17, 2007. Defendants SCI Fayette and the D.O.C. did not join the Notice of Removal filed by Defendant Prison Health Services Inc. within thirty days, violating the unanimity requirement of removal. Thus, the exception to the unanimity rule does not apply in this action. As removal was improper, Plaintiff's Motion for Remand should be granted.

III. CONCLUSION

It is respectfully recommended that Plaintiff's Motion to Remand to Commonwealth Court (doc. no. 5) should be granted as removal to this United States District Court for the Western District of Pennsylvania was not joined in or consented to by all Defendants, violating the unanimity requirement of 28 U.S.C. 1441.

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636 (b)(1)(B) and (C), and Rule 72.1.4 (B) of the Local Rules for Magistrate Judges, objections to this Report and Recommendation are due within ten days. Responses to objections are due by within ten days from the filing of objections. Failure to file timely objections may constitute a waiver of any appellate rights.



Lisa Pupo Lenihan
UNITED STATES MAGISTRATE JUDGE

Dated: June 28, 2007

cc: The Honorable Nora Barry Fischer
United States District Judge

Brian O'Toole, DX-1524
SCI-Fayette
P.O. Box 9999
Labelle, PA 15450-0999